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Planning, Culture, Tenure
Conceptions of Land as Property
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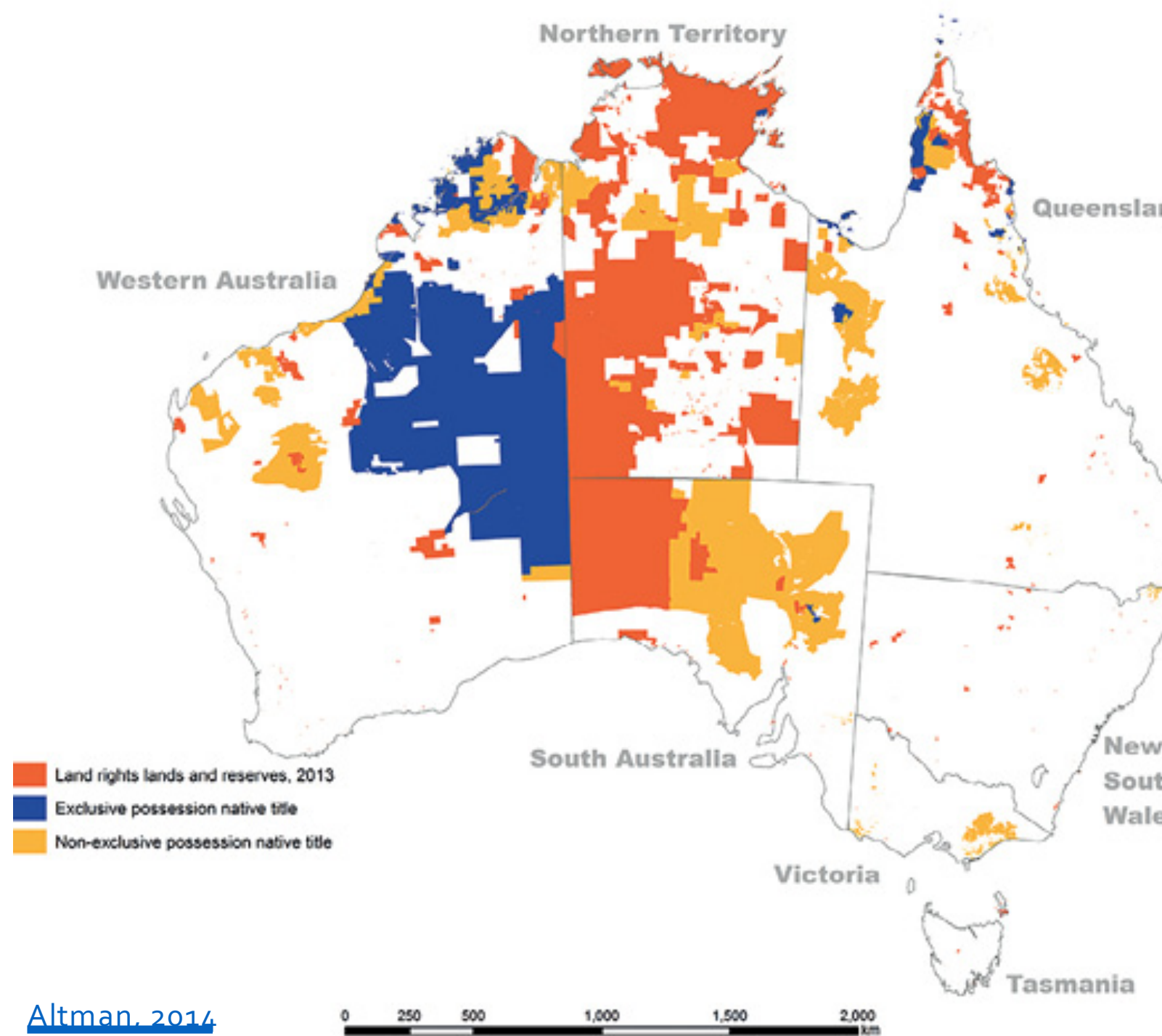
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TENURE, PLANNING, CULTURE

CONCEPTIONS OF LAND AS PROPERTY





The premise

The claim that the common law 'cannot' perceive Indigenous Australian land claims — including the construct of cultural heritage—as property does not hold up on an examination of land law.

Rather, the 'outsider' status of cultural heritage is a political decision, derived from a deficit approach to the Indigenous estate.

Scope

Complicity of the law and
the academy in colonisation

Western epistemology

(Coloniser's) land law lens

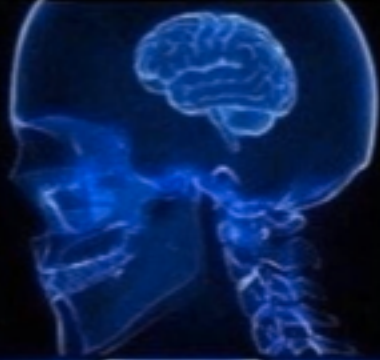
Assess law according to its
own 'self-referential terms'



Source of common law interests in land

Tenure is a political system as well
as a system of land law

TENURE



ESTATE



TITLE



OWNERSHIP



Nature of common law rights in land

Each term holds an indeterminate meaning at law, though their use imports an underlying coherent structure of land law comprehensible to the lawyer

Gray & Gray 'Rhetoric of Realty'

Content of rights in common law estate

...a perception of the
'plenary quality of title'

Gray & Gray 'Rhetoric of
Realty'





Planning law: property?

Planning of land use raises 'questions of general welfare ... which transcend the interests of any particular individual.'

R (Alconbury Developments Ltd and others) v Secretary of State for the Environment, Transport and the Regions [2001] 2 WLR 1389, [68]



Regardless...
expanded conception
of property

There is so little resemblance between property as our [sic] law understands that term and the claims of the plaintiffs for their clan, that it must be held that these claims are not in the nature of proprietary interests...

Milirrpum v Nabalco (1971) 17 FLR 141, 272

Nature of native title



Source

...its incidents and the persons
entitled thereto are ascertained
**according to the laws and
customs of the indigenous people**
who, by those laws and customs,
have a connexion with the land.

Mabo No 2 (1992), 70

Yet the state
interposes
itself to
'determine' an
Indigenous
interest in land





Nature

Native title as '**classified by the common law** as proprietary, usufructuary or otherwise'...

Mabo No 2 (1992), 70

Content

According to
**particularized
rights** in individual
claims

Disaggregated
conception of
property/rights



In light of all this, native title is seen by the common law as an impoverished, constrained, and fragile interest: property...but not property





Source of Indigenous 'cultural heritage'

- (eg) any sacred, ritual or ceremonial site, which is of *importance and special significance to persons of Aboriginal descent*

Aboriginal Heritage Act 1972 (WA), s5(b)

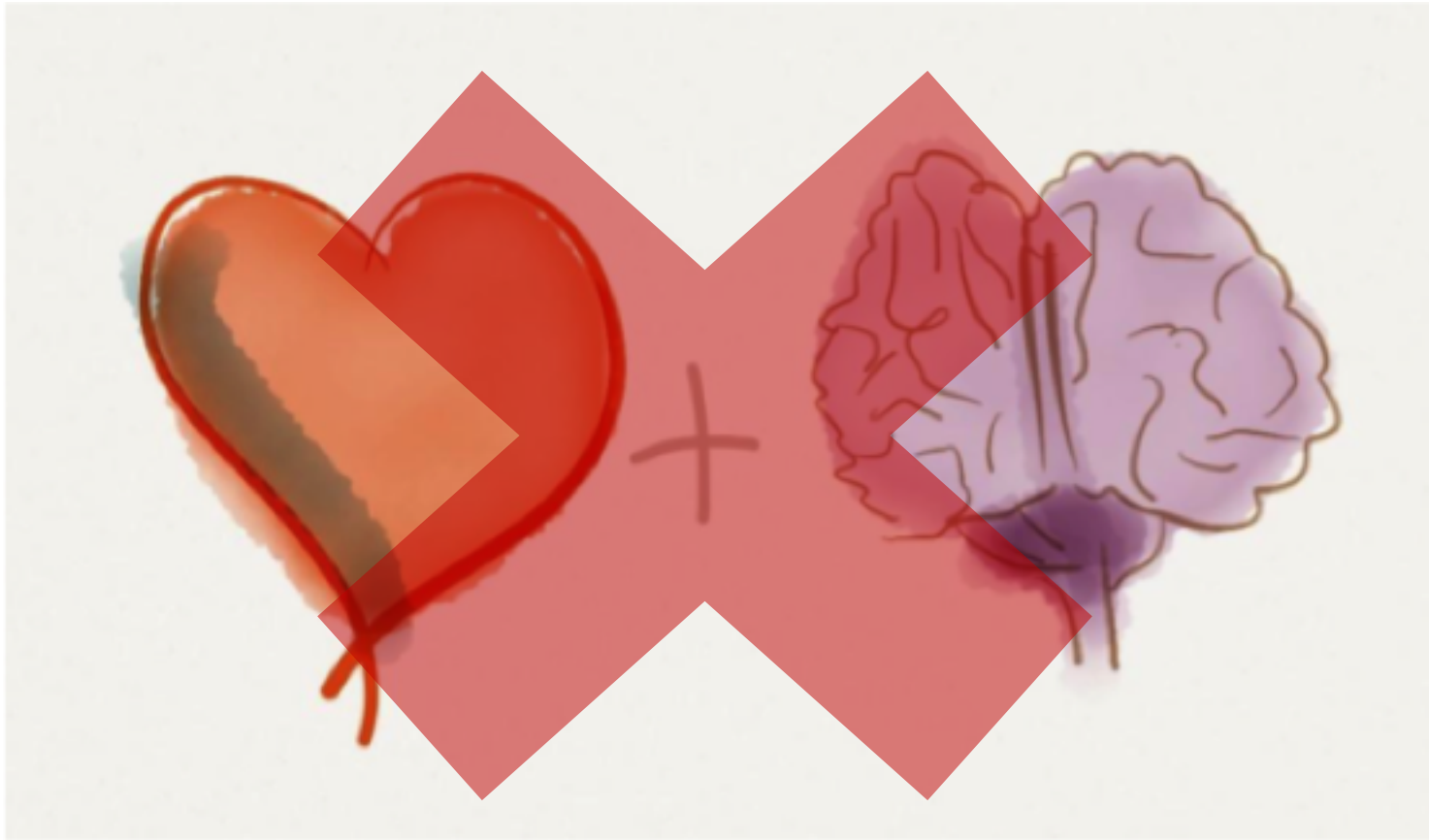
- (eg) any *significant Aboriginal or Torres Strait Islander area* in Queensland, object or evidence of archaeological or historical significance of occupation of Queensland

Aboriginal Cultural Heritage Act 2003 (Qld), s8

Nature of cultural heritage

1. Under protection/property of the State/Minister (WA, Tas, NSW, SA)
2. Recognise Aboriginal people and Torres Strait Islanders as the primary guardians, keepers and knowledge holders of their cultural heritage (Qld, Vic)





Content of cultural heritage

- Enforceable by the State in the interests of 'the community'
- Spiritual claim of the Indigenous respondents was based on 'a mere intellectual or emotional concern' vs 'special interest'

WA v Bropho (1991) 5 WAR 75, 87, 90

'Interests' in land: comparison

	Common law estate (fee simple)	Native title	Cultural heritage
Source	State grant (executive) but considered private	Customary law but State interposes to 'determine' (court)	State (executive)
Nature	Property	Indeterminate: Classified by common law as usufructuary/ proprietary	Executive right vested in State (or special interest to gain standing)
Content	Non-specific, plenary quality of title	Particularised, fragmented rights	Wider community interests

Incident of prior possessory interest

Tangible objects are fixtures → land

Differential property interests can co-exist

Covenants vest interest

Cultural heritage: part of **The Indigenous Estate** (common law orientation)

Political orientation of interests in land

Choosing which legal system to use to determine whether a particular entity...has sovereignty raises a normative issue of legitimacy: which legal system should be used? This is really a political and ethical issue, not a legal one.

Kent McNeil (2017)



Conclusions

It is the coloniser's political construction of conceptions of property that situate Indigenous interests in land tantalizingly close to the common law's protection, yet relegated to outsider status at the discretion of the State.

This is a product of the ongoing project to legitimize claims to sovereignty.

